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United States v. MacDonald: The Exigent Circumstances Exception and the Erosion of the Fourth Amendment

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COMMENT

UNITED STATES V. MACDONALD:1 THE EXIGENT CIRCUMSTANCES EXCEPTION AND THE EROSION OF THE FOURTH AMENDMENT2

I. INTRODUCTION

Despite the apparently clear mandate of the Fourth Amendment to the Constitution of the United States,3 courts have fashioned exceptions to the warrant requirement that allow law enforcement officers to effect searches and seizures without prior judicial authorization.4 One of these exceptions is the “exigent circumstances” doctrine.5 As early as 1948, the Supreme Court recognized that there

2. This phrase is taken from Chief Judge Oakes’ dissent in United States v. Cattouse, 846 F.2d 144, 150 (2d Cir.), cert. denied, 488 U.S. 929 (1988), another exigent circumstances case upholding a warrantless entry into a private home.
3. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.
Black’s Law Dictionary defines “exigence” or “exigency,” in part, as “demand, want, need, imperativeness; any event or occasional combination of circumstances calling for immediate action or remedy; a pressing necessity; pressing need or demand; case requiring immediate attention; critical period or condition; state of being urgent or exigent.” BLACK’S LAW
sometimes arise "exceptional circumstances in which, on balancing the
need for effective law enforcement against the right of privacy, it
may be contended that a magistrate's warrant may be dispensed
with."6

However, the Supreme Court recognized that "[t]he right of offi-
cers to thrust themselves into a home is also a grave concern, not
only to the individual but to a society which chooses to dwell in
reasonable security and freedom from surveillance."7 In Payton v.
New York,8 the Court reaffirmed this principle:

The Fourth Amendment protects the individual's privacy in a variety
of settings. In none is the zone of privacy more clearly defined than
when bounded by the unambiguous physical dimensions of an
individual's home—a zone that finds its roots in clear and specific
constitutional terms.9

The warrant requirement, mandating authorization by an impartial
magistrate based upon probable cause, balances the interest in privacy
in one's home with the public need for effective law enforcement.10

The point of the Fourth Amendment, which often is not grasped by
zealous officers, is not that it denies law enforcement the support of
the usual inferences which reasonable men draw from evidence. Its
protection consists in requiring that those inferences be drawn by a
neutral and detached magistrate instead of being judged by the
officer engaged in the often competitive enterprise of ferreting out

DICTIONARY 514 (5th ed. 1979).
The exigent circumstances doctrine differs from the "emergency doctrine," which has
been defined as follows:

Law enforcement officers may enter private premises without either an arrest or
search warrant to preserve life or property, to render first aid and assistance, or to
conduct a general inquiry into an unsolved crime, provided they have reasonable
grounds to believe that there is an urgent need for such assistance and protective
action, or to promptly launch a criminal investigation involving a substantial threat
of imminent danger to either life, health, or property, and provided, further, that
they do not enter with an accompanying intent to either arrest or search.

Edward G. Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under
the Fourth Amendment, 22 BUFF. L. REV. 419, 426 (1972); Melinda Roberts, Note, The
Emergency Doctrine, Civil Search and Seizure, and The Fourth Amendment, 43 FORDHAM L.
REV. 571, 581 (1975).
7. Id. at 14.
9. Id. at 585.
10. See Barbara C. Salken, Balancing Exigency and Privacy in Warrantless Searches to
Prevent Destruction of Evidence: The Need for a Rule, 39 HASTINGS L. J. 283, 286 (1987);
Stuntz, supra note 4.
crime. 11

In this context, the exigent circumstances exception was created to address those situations in which any delay by law enforcement officers would pose a risk of physical harm or imminent destruction of evidence in a serious crime. 12 Recently, however, it has been liberally and perhaps unconstitutionally applied, particularly in narcotics cases, to ward off defendants’ suppression of evidence motions in situations where there was no real exigency prior to police action. 13

This Comment analyzes one such case, United States v. MacDonald, 14 a recent decision of the United States Court of Appeals for the Second Circuit. Briefly, MacDonald involved the forcible, warrantless entry into a private dwelling to effect the arrests of suspects for narcotics trafficking and the subsequent search of the premises, during which the evidence at issue on appeal was discovered. 15 The United States District Court for the Southern District of New York denied the defendants’ motion to suppress the evidence found during the warrantless search, holding that the warrantless entry and search were justified by exigent circumstances. 16

The appeal from the Southern District was originally heard by a three-judge panel of the United States Court of Appeals for the Second Circuit composed of Chief Judge Oakes and Judges Kearse and Altimari. 17 The panel decision, reported as United States v. Thomas, 18 reversed the district court’s holding that exigent circumstances justified the warrantless entry into defendant MacDonald’s apart-


"Exigent circumstances" is the Supreme Court’s category for events not falling into the other specific exceptions but nonetheless requiring immediate action. This exception allows for a warrantless search or seizure where there is a compelling need for immediate official action and time does not permit the procurement of a warrant. The Court considers the facts of each case to determine whether it is a "now or never" situation. See, e.g., McDonald v. United States, 335 U.S. 451, 451-56 (1948).

15. Id. at 768-69. See infra notes 102-31 and accompanying text.
16. Id. at 769.
17. United States v. Thomas, 893 F.2d 482 (2d Cir. 1990).
18. Id.
ment.\(^{19}\) Rehearing en banc was granted, and oral arguments were heard in June, 1990. The majority of the Second Circuit affirmed the district court, rejecting the reasoning of the original panel's holding.\(^{20}\) Judge Altimari, who had dissented from the original panel in \emph{Thomas}, drafted the majority opinion,\(^{21}\) and Judge Kearse, who had written the original panel's opinion,\(^{22}\) drafted the \emph{MacDonald} dissent, joined by Chief Judge Oakes and Judge Feinberg.\(^{23}\)

\emph{MacDonald} provides an excellent framework for examining the exigent circumstances doctrine, for it illustrates the potentially far-reaching impact and application of this exception to the warrant requirement. This Comment will first discuss the specific facts of \emph{MacDonald}. Next, it will outline the law governing the exigent circumstances exception, and will provide discussion of a number of cases as a basis of comparison. Finally, this Comment will analyze the \emph{MacDonald} decision itself in light of the applicable law and policy considerations.

II. EXIGENT CIRCUMSTANCES: AN OVERVIEW

A. The Supreme Court Test

Although the exigent circumstances exception to the warrant requirement has been the subject of divergent and contradictory decisions by district and appellate courts and of a number of scholarly articles, the United States Supreme Court has never clearly defined its contours. Recently, the Court observed that a state court had applied the proper test in determining that exigent circumstances did not justify a warrantless entry.\(^{24}\) The test had required probable cause to believe one of the following circumstances existed: imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. In addition, the Court noted "that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered . . . ."\(^{25}\)

This test clearly requires urgency, or the need for immediate

\begin{footnotes}
19. \textit{Id.} at 491.
20. \textit{MacDonald}, 916 F.2d at 773.
22. \textit{Thomas}, 893 F.2d at 482.
23. \textit{MacDonald}, 916 F.2d at 773-77.
25. \textit{Id.} at 97.
\end{footnotes}
action. Only in the face of truly exigent circumstances is the Supreme Court willing to forego the warrant requirement. However, as this Comment will show, this type of urgency was not present in the facts of MacDonald.

B. The Second Circuit Test

All of the circuit courts agree that danger of physical harm and destruction of evidence are exigent circumstances that may justify warrantless action. However, the circuit courts have established different tests for exigent circumstances. In United States v. Dorman, the District of Columbia Circuit set forth a list of factors to serve as guideposts in a determination of exigency. These factors, applied by the Second Circuit in MacDonald, are summarized as follows:

(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is "reasonably believed to be armed"; (3) "a clear showing of probable cause . . . to believe that the suspect committed the crime"; (4) "a strong reason to believe that the suspect is in the premises being entered"; (5) "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the peaceful circumstances of the entry.

26. See generally Salken, supra note 10 (discussing the different approaches of the courts and the elements that the different tests have in common).

27. Id. at 287-88. Salken categorizes these tests into three groups. The first is the "examine-avoid" approach, which critically analyzes an officer's claim of exigent circumstances and requires that officers avoid warrantless action when possible. Id. at 288. The First, Third and Fourth Circuits fall into this most protective category. Id. at 303. The second group is the "uncritical approach," in which courts accept at face value an officer's assertion of exigency and do not affirmatively require police to avoid warrantless action when possible. Id. at 288. The Sixth, Eighth, and District of Columbia Circuits follow this analysis. Id. at 311. The third category is the "examine only" approach, which involves critical analysis of the claim of exigency but does not affirmatively require avoidance of warrantless action. Id. at 288. This group includes the Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. Id. at 314.

Since the Second Circuit in MacDonald applied a test from the D.C. Circuit, see infra note 134 and accompanying text, the classification outlined above is not particularly useful for this analysis.


29. Id. at 392-93.

30. MacDonald, 916 F.2d at 769-70.


It is interesting to note that, although the Second Circuit cites the destruction of evidence as a single "Dorman factor" justifying a warrantless entry or search, it fails to list

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The Second Circuit, in analyzing the Dorman factors, has stated that they "are not intended as an exhaustive canon, but as an illustrative sampling of the kind of facts to be taken into account." Furthermore, the court has held that the presence of one factor may be sufficient for a finding of exigency. Yet "the essential question . . . is whether law enforcement agents were confronted by an 'urgent need' to render aid or take action."

Case law in several of the circuits, including the Second Circuit, has also established that law enforcement officers cannot create the exigent circumstances upon which they later attempt to rely to seek to validate a warrantless entry, search, or seizure. In United States v. Segura, the leading case on point, the Second Circuit held that the exigent circumstances claimed to validate a warrantless entry were impermissibly created by the officers involved. In Segura, the police had arrested one of two suspects at the entrance to the apartment building that was to be entered. The other suspect was believed to be in the apartment that was under surveillance. The agents then forced the arrested suspect to the door of the apartment, thus alerting the occupant inside to the agents' involvement. But for this action by the police, the suspect inside the apartment would have had no reason to dispose of the narcotics that were the subject of the investigation. Therefore, the Second Circuit held that the claimed exigent circumstances upon which the officers later sought to rely to validate the warrantless entry were impermissibly created by the officers involved. A district court's determination as to whether exigent circumstances existed is fact-specific and will not be reversed unless clearly erroneous.

This factor in its summary. See MacDonald, 916 F.2d at 770. (noting that "sometimes the presence of a solitary factor suffices, see, e.g., United States v. Gallo-Roman, 816 F.2d 76, 79-80 (2d Cir. 1987) (destruction of evidence)").

32. MacDonald, 916 F.2d at 770.
33. Id.
34. Id. (quoting Dorman, 435 F.2d at 391). A district court's determination as to whether exigent circumstances existed is fact-specific and will not be reversed unless clearly erroneous. Cattouse, 846 F.2d at 146. See also Minnesota v. Olsen, 495 U.S. at 95.

The district court's test is an objective one that turns on the totality of the circumstances confronting law enforcement agents in the particular case. See United States v. Schaper, 903 F.2d 891, 894 (2d Cir. 1990); United States v. Miles, 889 F.2d 382, 383 (2d Cir. 1989); United States v. Zabare, 871 F.2d 282, 290-91 (2d Cir.), cert. denied, 493 U.S. 856 (1989).

36. Segura, 663 F.2d 411.
37. Id. at 414-15.
38. Id. at 413; see also infra notes 81-90 and accompanying text.
39. Segura, 663 F.2d at 413.
40. Id.
41. Id.; see also United States v. Thomas, 893 F.2d 482, 483 (2d Cir. 1990); United
cies would not be permitted to validate the warrantless entry.\textsuperscript{42}

C. Cases Analyzing the Exigent Circumstances Exception

To provide a foundation to analyze the \textit{MacDonald} decision, it is necessary to examine several cases in which the exigent circumstances doctrine was at issue. The following are but a few of the many cases in this area.

1. Cases Finding Exigent Circumstances

In \textit{United States v. Martinez-Gonzalez},\textsuperscript{43} the Second Circuit cited several of the \textit{Dorman} factors as the basis for justifying a warrantless entry.\textsuperscript{44} Since the suspect was aware of the agents' presence outside the door and of their intent to enter, any delay in arresting him would have jeopardized the agents' ability to confiscate incriminating evidence.\textsuperscript{45} The court also noted that the agents knew for certain that the suspect was inside and that he was in possession of a weapon.\textsuperscript{46} The court limited a previous case, \textit{United States v. Gomez},\textsuperscript{47} by holding that the presence of sounds likely to accompany the destruction of evidence, such as scurrying feet, running water, and the flushing of a toilet,\textsuperscript{48} were not required for a finding of exigent circumstances.\textsuperscript{49}

The Second Circuit again applied the exigent circumstances exception to uphold a warrantless entry in \textit{United States v. Gallo-Roman}.\textsuperscript{50} In \textit{Gallo-Roman}, a United States Customs mail technician intercepted mail that was found to contain cocaine.\textsuperscript{51} The mailed articles were forwarded to the Drug Enforcement Agency ("DEA") for controlled delivery in New York.\textsuperscript{52} A claimant picked up one of the

\textsuperscript{42} Segura, 663 F.2d at 415 (quoting Allard II, 634 F.2d at 1187).
\textsuperscript{43} 686 F.2d 93 (2d Cir. 1982).
\textsuperscript{44} Martinez-Gonzalez, 686 F.2d at 100-01.
\textsuperscript{45} Id. The incriminating evidence was related to drug trafficking. Id.
\textsuperscript{46} Id.
\textsuperscript{47} 633 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 994 (1981).
\textsuperscript{48} Id. at 1002.
\textsuperscript{49} Martinez-Gonzalez, 686 F.2d at 101. The court also noted, however, that the officers heard the sound of a toilet flushing after they had opened the door to the dwelling and before they had entered. Id.
\textsuperscript{50} 816 F.2d 76 (2d Cir. 1987).
\textsuperscript{51} Id. at 78. The substance was hidden between the front facing and back paper of photographs. Id.
\textsuperscript{52} Id.
packages at a post office and was followed to a residence by the DEA agents, who then entered the apartment behind the suspect and confiscated the evidence. The court held that, since the suspect would have discovered the government's involvement when he opened the package and realized that it had been tampered with, there was a likelihood of imminent destruction of evidence, which validated the otherwise unconstitutional entry and seizure.

In United States v. Martino, the likelihood of destruction of evidence was again cited as the factor that satisfied the exigent circumstances test. One suspect in a drug trafficking operation had been arrested and others had fled from police. Since only two DEA agents had been on the scene, one remained behind with the apprehended suspect while the other pursued the co-conspirators. The pursuing agent, fearful that the fleeing felons would destroy evidence, first retrieved a package containing narcotics from one suspect's backyard, where an informant had stated that it had been stashed. The court held that the agent, required both to preserve evidence and to catch the suspects, was fully justified in first confiscating the evidence, even though the agent had to make a warrantless entry onto private property in order to do so.

The threat of physical danger to an informant was the factor that

53. Id.
54. Id. at 79.

It was certainly reasonable for the agents to conclude that, once the envelope was opened, the false backs removed from the photographs, and the discovery made that the photographs had been tampered with, it would become apparent that the scheme had been uncovered and that the authorities were near. Under these circumstances, the agents reasonably could have anticipated that the perpetrator would act quickly to destroy the evidence of unlawful conduct. Therefore, because possible destruction of the evidence was imminent, the agents did not violate the fourth amendment in entering and searching the apartment.

55. 664 F.2d 860 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982). The majority opinion was written by Judge Kearse, who wrote the dissent in MacDonald.
56. Id. at 869-70.
57. Id. at 865.
58. Id. at 870.
59. Id.
60. Id. If the agent had guarded the yard, the suspects would have escaped. On the other hand, if the agent had gone directly in pursuit of the suspects, one of the suspects might have been able to retrieve the narcotics first and would have been likely to dispose of the incriminating evidence. Id. at 869-70.
61. Id.
justified a warrantless entry in United States v. Crespo. In Crespo, agents who were concerned for the safety of an informant who had been "found out" entered a suspect's apartment and effected an arrest without a warrant. There was a need for immediate action; had the agents waited to obtain a warrant, there was a reasonable likelihood that the informant would have been harmed.

The following two cases define the outer limits of the exigent circumstances doctrine. In United States v. Cattouse, police arranged a controlled drug buy through an informant using marked bills. After the informant emerged from the suspect's apartment building with the controlled substance, the agents entered the apartment without a warrant, seized the evidence, and arrested the suspect. Defendant Cattouse argued in a suppression hearing that the agents themselves had created the threat of destruction of evidence by using marked bills. However, the court held that "[t]he likelihood that the buy money would be removed from the apartment, the ever-increasing risk that the agents would be detected, and the increasing danger of provoking a violent confrontation, fully justified the agents' decision to make the arrest without first obtaining a warrant." Distinguishing United States v. Segura, the court stated that "the exigency arose not from the agents' conduct but because of the suspect's activity."

The decision in United States v. Tobin, an Eleventh Circuit

63. Id. at 269. The court also pointed out that the suspect had committed a grave offense, i.e., threatening the informant, a government employee, was known to be armed, might have escaped because only one agent was covering the back of the building, and also might have destroyed evidence. Id. at 270-71; see also United States v. Dorman, 435 F.2d 385 (D.C. Cir. 1970); supra notes 28-31 and accompanying text.
64. Crespo, 834 F.2d at 271. The court never addressed the fact that the police could have protected the informant by placing her in protective custody.
66. Id. at 145-46.
67. Id. at 146.
68. Id.
69. The agents were all white and the drug buy and subsequent arrest took place in a predominantly black neighborhood. Id. at 145.
70. Id. at 148. But see id. at 148-50 (Oakes, Circuit Judge, dissenting).
71. 663 F.2d 411; see also infra notes 81-90 and accompanying text.
72. Canouse, 846 F.2d at 148. This conclusion is without basis in the record. If the agents had not used marked money, or had first obtained a warrant so that they would be ready to make an arrest immediately following the controlled buy, there would not have been a threat of destruction of evidence.
73. 923 F.2d 1506 (11th Cir.) (en banc), reh'g en banc denied, 935 F.2d 1297, cert.
case, also tests the boundaries of the exigent circumstances doctrine. In *Tobin*, three agents, while in the course of an unrelated surveil-

lance, observed defendant Tobin remove clear plastic tubular bags from the trunk of his car and enter a house with a second defen-

dant.74 The agents, believing the bags to contain cocaine, knocked on the door of the house until it was opened by one of the defen-

dants.75 When the man retreated into the house, an agent followed him in.76 Upon seeing the open bag and determining that it was co-

caine, the agents arrested Tobin and the second defendant.77 Al-

though noting that "[c]ircumstances are not normally considered exi-

gent where the suspects are unaware of police surveillance,"78 the court upheld the warrantless entry.79 The court concluded that "the agents could reasonably conclude from the defendants’ hurried actions and furtive looks that the defendants were either aware or afraid that someone was watching them."80

2. Cases Finding No Exigent Circumstances

In *United States v. Segura*,81 law enforcement agents had main-

tained a surveillance of defendants Segura and Colon for about a month.82 When the agents saw the defendants deliver a package be-

lieved to contain cocaine, the agents stopped, questioned, and arrested the recipients.83 The officers then began a surveillance of Segura’s apartment.84 Segura entered the building alone and was apprehend-

ed.85 The agents took Segura forcibly to the second-floor apartment and, without permission, entered.86 Colon was inside.87 Once in the apartment, the agents discovered evidence of drug trafficking.88 The officers testified at trial that they had observed neither lights nor

74. Id. at 1508.
75. Id.
76. Id.
77. Id.
78. Id. at 1511 (citations omitted).
79. Id.
80. Id. But see id. at 1514-17 (Clark, Circuit Judge, dissenting).
82. Id. at 413.
83. Id.
84. Id.
85. Id.
86. Id.
87. Id.
88. Id.
sounds inside the apartment.\textsuperscript{89} The Second Circuit, affirming the
district court's finding that the entry was not justified by exigent circum-
stances, held that a warrantless search could be justified only when
law enforcement agents have a reasonable belief that someone is
within the dwelling and that the person inside is aware of the
government's involvement.\textsuperscript{90}

Using similar reasoning, the Fourth Circuit in \textit{United States v. Collazo}\textsuperscript{91} held that exigent circumstances did not justify a warrant-
less entry.\textsuperscript{92} In \textit{Collazo}, Federal Bureau of Investigation agents en-
tered a private residence without a warrant, hoping to find a suspect
who had not appeared at an undercover drug buy at which his co-
horts had been arrested.\textsuperscript{93} The court held that the officers, who were
concerned about the destruction of evidence, should have obtained
warrants prior to the arrests of the co-felons.\textsuperscript{94} The court also noted
that, since the building was already under surveillance, any chance of
escape was minimal, and that the agents had adequate probable cause
to request and obtain a search warrant.\textsuperscript{95} Furthermore, the court held

\textsuperscript{89} Id.
\textsuperscript{90} Id. at 414-15. Cf. United States v. Martinez-Gonzalez, 686 F.2d 93 (2d Cir. 1982);
\textit{supra} notes 43-49 and accompanying text. In Martinez-Gonzalez, the Second Circuit held that
the warrantless entry was justified because the suspect inside the dwelling was aware of the
agents' surveillance and intent to enter.

Requiring knowledge of government involvement relates to the likelihood that evidence
may be destroyed; if the suspect inside the dwelling is aware of police surveillance, it is
reasonable to expect imminent destruction of evidence. The converse, that a suspect unaware
of police surveillance will not destroy evidence, is also true absent other unusual circumstanc-
es.

\textsuperscript{91} 732 F.2d 1200 (4th Cir. 1984), \textit{cert. denied}, 469 U.S. 1105 (1985).
\textsuperscript{92} Id. at 1204.
\textsuperscript{93} Id. at 1202-03.
\textsuperscript{94} Id. at 1204. "The government will not be allowed to plead its own lack of prepara-
tion to create an exigency justifying warrantless entry." \textit{Id}.
\textsuperscript{95} Id. While some courts have held that the ability of officers to obtain a warrant
prior to the warrantless entry does not impact upon the exigent circumstances analysis, \textit{e.g.},
\textit{Cattouse}, 846 F.2d 144, 147, other courts seem to consider this factor, \textit{e.g.}, \textit{Gallo-Roman},
816 F.2d 76, 81 (exigent circumstances were not mitigated by failure to obtain warrant
because suspect's address was unknown). Even in \textit{Cattouse}, the court makes mention of the
fact that the officers did not know the suspect's name. \textit{Cattouse}, 846 F.2d at 145. \textit{See
MacDonald}, 916 F.2d at 776 (Kearse, Circuit Judge, dissenting) ("I do not believe we should
allow law enforcement officers who have probable cause early to tarry and then justify a
warrantless entry on the basis of the lateness of the hour.").

This issue is perhaps at the heart of the exigent circumstances doctrine. If there is
sufficient time and probable cause to obtain a warrant before effecting a warrantless entry,
without risk of harm or destruction of evidence, then there is no real exigency. \textit{Cf. United
States v. Rivera}, 762 F. Supp. 49, 55 (S.D.N.Y. 1991) ("The facts at bar show that the
officers had enough time to obtain a search warrant prior to the arrest, and since there were
that the officers' actions in entering the house "created a situation of danger at least comparable to that which might have been presented by a fleeing suspect."96

The Ninth Circuit refused to apply the exigent circumstances exception in United States v. Allard.97 In Allard, Drug Enforcement Agency agents arrested defendant Allard at his home pursuant to a warrant, but failed to find contraband at his residence.98 The agents then, on a tip, requested entry to a hotel room from the occupant who had co-registered for the room with Allard.99 The occupant, who, prior to the agents' arrival, had no knowledge of Allard's arrest, acquiesced to the entry but refused to permit a search of the room.100 The court held that the subsequent seizure did not fall under the exigent circumstances exception since there was no reason for the agents to believe that the suspect would have destroyed evidence prior to their request to enter.101

III. FACTS OF MACDONALD102

In May, 1988, a reliable confidential informant told the New York Drug Enforcement Task Force that narcotics were being stored in apartment 1-0 of 321 Edgecombe Avenue in Manhattan ("321 Edgecombe") and in another unidentified apartment in the building.103 On the evening of September 8, Task Force agents set up a surveillance of 321 Edgecombe.104 The group of agents was ethnically mixed, and blended in with the population of the area.105 In

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96. Collazo, 732 F.2d at 1204.
97. 600 F.2d 1301 (9th Cir. 1979) (Allard I), aff'd on reh'g, 634 F.2d 1182 (9th Cir. 1980) (Allard II).
98. Allard I, 600 F.2d at 1302.
99. Id. at 1303.
100. Id.
101. Id. at 1304. In a footnote, the court distinguished the government's principal case, United States v. Fulton, 549 F.2d 1325 (9th Cir. 1977). In Fulton, the defendant was arrested directly outside and in view of a hotel room in which officers believed a co-defendant was present and in possession of heroin. The Ninth Circuit held that exigent circumstances existed because of the likelihood of destruction of evidence. See Allard I, 600 F.2d at 1304 n.2.
102. MacDonald, 916 F.2d at 768-69. The facts were undisputed. See Thomas, 893 F.2d at 483; MacDonald, 916 F.2d at 768.
103. MacDonald, 916 F.2d at 768.
104. Id.
105. Id. at 775 (Kearse, Circuit Judge, dissenting). Compare Thomas, 893 F.2d at 485
addition, the agents’ vehicles were unmarked and inconspicuous.\textsuperscript{106}

The agents, joined by DEA Special Agent Agee, observed a steady succession of cars drive up to the building, double-park, and wait as passengers went inside 321 Edgecombe and emerge shortly thereafter.\textsuperscript{107} Between about 6:50 p.m. and 9:40 p.m., the agents observed some fifteen to twenty such occurrences.\textsuperscript{108} Agent Agee followed several individuals into the building and saw them enter and exit apartment 1-0.\textsuperscript{109} One individual was observed placing something in the gas cap of his car before driving away from 321 Edgecombe.\textsuperscript{110} At about 9:30 p.m., agents followed one car until it was out of sight of the building, then stopped and questioned the occupants.\textsuperscript{111} The occupants confirmed that several individuals inside apartment 1-0 were selling narcotics\textsuperscript{112} and informed the agents that sales were not limited to regular customers.\textsuperscript{113}

Based upon this information, Agent Agee telephoned his supervisor, who authorized Agee to attempt to effectuate an undercover narcotics buy with pre-recorded money.\textsuperscript{114} At approximately 9:50 p.m., Agent Agee knocked on the door of apartment 1-0 and was admitted.\textsuperscript{115} Once inside, Agee observed six men, including defendants Thomas and MacDonald,\textsuperscript{116} and what was later confirmed to be bags of marijuana and cocaine, in plain sight.\textsuperscript{117} The apartment

\textit{with Cattouse, 846 F.2d at 147-48.}
\textsuperscript{106} \textit{MacDonald}, 916 F.2d at 775 (Kearse, Circuit Judge, dissenting). The cars were so indistinguishable that one of the agents testified that he could not identify any but his own. \textit{Id.}
\textsuperscript{107} \textit{Thomas}, 893 F.2d at 483.
\textsuperscript{108} This fact does not appear in either the \textit{Thomas} or the \textit{MacDonald} opinions, but was established at trial. Brief for the Appellee, dkt. no. 89-1262 [hereinafter Brief for the Appellee].
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Thomas}, 893 F.2d at 483.
\textsuperscript{111} En Banc Brief for the Appellee, dkt. no. 89-1262, at 4 [hereinafter En Banc Brief for the Appellee].
\textsuperscript{112} \textit{Id.} It is likely that the agents would have had probable cause to obtain a warrant at this point in their investigation. \textit{See} Texas v. Brown, 460 U.S. 730 (1983) (defining probable cause).
\textsuperscript{113} En Banc Brief for the Appellee at 5.
\textsuperscript{114} \textit{Id.} The serial number of the bill given to the defendants in exchange for the controlled substance was recorded prior to the transaction. \textit{Id.}
\textsuperscript{115} \textit{MacDonald}, 916 F.2d at 768. This entry was authorized by consent of the occupant. \textit{See supra} note 4 (consent is another exception to the warrant requirement).
\textsuperscript{116} \textit{MacDonald}, 916 F.2d at 768. Only defendant MacDonald appealed the district court’s denial of the motion to suppress evidence obtained in the warrantless search. \textit{Id.}
\textsuperscript{117} \textit{Id.}
smelled of marijuana smoke, although no one was observed smoking. Thomas, who was closest to the bags of marijuana and cocaine, was holding a nine-millimeter pistol, aimed in Agee's general direction about four feet from his head. MacDonald, within reach of a .357 magnum revolver, was seated on a couch counting a large amount of cash. The windows of the apartment overlooked Edgecombe Avenue.

Agee purchased a five-dollar bag of marijuana with the pre-recorded bill and left the apartment. A few minutes later, at about 10:00 p.m., Agee and six other agents approached apartment 1-0 with guns drawn, carrying a battering ram. The agents knocked, identified themselves as police officers, and asked to speak with the occupants of the apartment. There was no direct response, but the agents testified that they heard the sounds of shuffling feet within the apartment. Via radio, the agents were told by officers on the street that the suspects were escaping through windows onto Edgecombe Avenue. Using the battering ram, the agents forcibly entered the apartment. They apprehended five men and seized

118. Id. "The suggestion that the suspects themselves had been smoking marijuana in the apartment goes beyond the record." Id. at 775 (Kearse, Circuit Judge, dissenting). But see Thomas, 893 F.2d at 492 (Allimari, Circuit Judge, dissenting) (stating that "[the highly volatile mix of loaded weapons with drug abuse created an emergency situation that could explode at any moment.").
119. MacDonald, 916 F.2d at 768.
120. Id.
121. Brief for the Appellee.
122. MacDonald, 916 F.2d at 768. Agee could have effected a legal arrest while inside. See United States v. Rivera, 762 F. Supp. 49, 53 (S.D.N.Y. 1991). "Under certain circumstances, the use of stratagem or deception to obtain evidence is permissible even in the absence of a warrant. For example, an undercover agent posing as a drug purchaser may enter a person's home to make an illegal drug purchase." Id. (citing Lewis v. United States, 385 U.S. 206, 208-09 (1966)). Cf. MacDonald, 916 F.2d at 773 (Kearse, Circuit Judge, dissenting) ("Having probable cause for arrest, Agee could indeed have arrested them lawfully at that point, but that power was unrelated to any exigent circumstances; he could have arrested them then because he was lawfully in the apartment by reason of their consent.") (citing Payton, 445 U.S. at 576; Draper v. United States, 358 U.S. 307 (1959)). However, once Agee left the apartment, the consent terminated, and new consent would be required to re-enter. See infra notes 165-69 and accompanying text.
123. Thomas, 893 F.2d at 483.
124. MacDonald, 916 F.2d at 768.
125. Id. See supra notes 47-49 and accompanying text.
126. MacDonald, 916 F.2d at 768.
127. Brief for the Appellee. The majority in MacDonald held that this satisfied the sixth Dormian factor, see supra note 31 and accompanying text, because it was "an attempt by the agents to enter peacefully." MacDonald, 916 F.2d at 773. 
two weapons, a quantity of marijuana and cocaine, a large amount of cash, including the pre-recorded five dollar bill, and other evidence associated with drug trafficking.\textsuperscript{128}

Agee testified at trial that he did not believe that he had been recognized as an agent by anyone in the apartment, and that he had not observed any counter-surveillance by the suspects.\textsuperscript{129} He also stated that he believed a warrant would have taken at least two hours to be issued, and that the agents feared that the evidence might be destroyed during this time period.\textsuperscript{130} Agee further testified that it would have been possible for the suspects to move the evidence to the other unidentified location in the building.\textsuperscript{131}

IV. MACDONALD: DISCUSSION

The majority opinion is premised on two separate findings: first, that exigent circumstances existed prior to the officers’ knocking on the door to apartment 1-0,\textsuperscript{132} and second, that even if the circumstances were not exigent prior to the knock on the door, the officers’ actions were appropriate and thus did not impermissibly create the exigent circumstances that followed.\textsuperscript{133} This discussion will show that both of these conclusions are wrong. Interestingly, if the majority’s first conclusion, that exigent circumstances existed prior to the knock, was correct, the second premise would be moot. Thus, this part of the opinion is actually dicta.

A. Exigent Circumstances Before the Knock

Applying the Dorman test,\textsuperscript{134} the majority reasons that “numerous factors support . . . [the] conclusion that exigent circumstances justified the warrantless entry.”\textsuperscript{135} It is true that some of the Dorman factors were met. The suspects were clearly armed,\textsuperscript{136} the agents had probable cause to believe that the suspects were commit-

\textsuperscript{128} Thomas, 893 F.2d at 483; MacDonald, 916 F.2d at 768.
\textsuperscript{129} Brief for the Appellee.
\textsuperscript{130} Id. See also Thomas, 893 F.2d at 485. An objective basis for the belief that evidence might be destroyed is required. MacDonald, 916 F.2d at 774 (Kearse, Circuit Judge, dissenting).
\textsuperscript{131} Id. at 775.
\textsuperscript{132} See MacDonald, 916 F.2d at 771.
\textsuperscript{133} Id.
\textsuperscript{134} See supra notes 26-34 and accompanying text.
\textsuperscript{135} MacDonald, 916 F.2d at 773.
\textsuperscript{136} Id. at 768.
The majority asserts that "the ongoing sale and distribution of narcotics constituted a grave offense." However, the sale of narcotics is a grave offense in the aggregate because of its overall detrimental effect on society, not due to the dangers it poses from one transaction. In her dissent, Judge Kearse stated that

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\text{the principal factor relied on by the majority in the present case to reach the conclusion that there was an urgent need to enter without a warrant is that narcotics trafficking is a grave offense. Indeed it is; but though certain types of crimes, such as attempted murder or arson, create an inherent exigency while in progress, narcotics trafficking is not of that genre. There has never been an exigent circumstances exception permitting a warrantless entry simply because the offense involves narcotics.}
\]

The majority further reasons that "the volatile mix of drug sales, loaded weapons and likely drug abuse presented a clear and immediate danger to the law enforcement agents and the public at large." However, there is no support in the record for the proposition that the suspects were themselves using drugs other than Agee's testimony that he smelled marijuana in the apartment. The presence of weapons posed no danger if the suspects had no reason to use them, and certainly did not pose a threat to agents who were unknown to the suspects and were outside the building.

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137. Id. The suspects were charged with intent to distribute cocaine in violation of 21 U.S.C. sections 812, 841(a)(1), and 841(b)(1)(C) and 18 U.S.C. section 2, and with use of a firearm in connection with a narcotics offense in violation of 18 U.S.C. section 924(c). Defendant MacDonald was convicted of these offenses by a jury. See Thomas, 893 F.2d at 482.

138. MacDonald, 916 F.2d at 768. See supra note 112 and accompanying text.

139. MacDonald, 916 F.2d at 770.

140. Id. at 775 (Kearse, Circuit Judge, dissenting); see also Cattouse, 846 F.2d at 149 (Oakes, Circuit Judge, dissenting):

I am also troubled by the majority's willingness to find exigent circumstances based largely on generalizations about the habits and practices of drug dealers. . . . So, with the general knowledge that drug dealers often use guns, lookouts, and runners, all that is needed to create an exigence is an operation using marked buy money, probable cause, and a strong possibility that the suspect is in the apartment to be entered. Perhaps we should be more forthright and say that the Fourth Amendment's warrant requirement is simply inapplicable in drug buy cases.

Id.

141. MacDonald, 916 F.2d at 770.

142. Id. at 768. See supra note 118. Furthermore, the use of marijuana has never been linked to increased tendencies toward violence.
The majority also states that there was a likelihood that the suspects would escape, since the man who had made the sale to Agee "apparently" had escaped after Agee’s purchase and before the warrantless entry. However, this could not have been known to the officers at the time they entered the building to make their arrest, since there is no testimony that they saw this suspect escape. The exception requires that officers have an objective basis to believe that an urgent need required immediate action.

Furthermore, the majority states that the agents acted in accordance with the law, and first attempted to effect a peaceful entry by knocking and announcing themselves. However, the fact that the officers knocked politely before demolishing the door with a battering ram cannot re-characterize this entry as peaceful. The central factor to be considered in determining the character of the entry is "the peaceful circumstances of the entry," not the circumstances prior to that entry.

Finally, the majority held that the district court’s finding that the agents were confronted by an urgent need to prevent the possible loss of evidence cannot be said to be clearly erroneous in light of the information that the suspects were using an unidentified apartment in the building to store narcotics, the ease with which the suspects could have disposed of the cocaine by flushing it down the toilet, and the possibility that the prerecorded five dollar bill used by Agent Agee in the undercover buy would be lost if the ongoing drug transactions were permitted to continue while the agents sought a warrant.

However, the court fails to explain why the suspects, who had conducted an ongoing operation from that location for at least four months, would suddenly choose to dispose of the narcotics unless they became aware of the agents’ surveillance. Furthermore, there

143. *MacDonald*, 916 F.2d at 770.
144. See id. at 774 (Kearse, Circuit Judge, dissenting); United States v. Reed, 572 F.2d 412 (2d Cir. 1978).
145. *MacDonald*, 916 F.2d at 770.
146. Id. at 769-70.
147. Id. at 770.
148. Police first learned that drug trafficking was taking place at 321 Edgecombe in May, and the night of the arrest was September 8th of the same year. Id. at 768.
149. Id. at 776 (Kearse, Circuit Judge, dissenting) ("There was simply nothing in the record to suggest that the suspects would suddenly, after at least four months of operation, start to destroy their business assets.")
was no basis for a belief that the suspects would move to another apartment. And while there was a possibility that the pre-recorded bill might be given to another purchaser as "change," this one fact does not amount to an exigency. In addition, the agents could have conducted another undercover purchase with a new pre-recorded bill immediately upon obtaining a warrant to ensure that they would have this kind of evidence.

There is insufficient factual support to establish exigency in MacDonald. Unlike the suspects in Tobin, MacDonald and his co-defendants exhibited no behavior that indicated that they were aware of, or even suspected, the agents' presence and activity. Neither the agents nor their vehicles were conspicuous, Agent Agee's profession was not revealed to the suspects during the drug buy, and the questioning of the people who had purchased drugs in the apartment was conducted out of eyesight of the suspects. Unlike the circumstances in Gallo-Roman, where the suspect was bound to discover that his package had been tampered with, and in Cattouse, where the bills used to make the undercover buy were marked and not pre-recorded, nothing the agents had done up to the point at which they knocked on the door could have possibly alerted the defendants to government involvement. Ironically, the absence of exigent circumstances was due to the high quality of police work in this case, which turned sour upon the agents' knock on the door to apartment 1-0.

B. Exigent Circumstances After the Knock

Clearly, after the agents knocked on the door of the apartment, exigent circumstances were present because the suspects were then aware of police presence and, in fact, attempted to escape. The majority argues that this action by the agents was permissible because it was not illegal.

Exigent circumstances are not to be disregarded simply because the suspects chose to respond to the agents' lawful conduct by attempting to escape, destroy evidence, or engage in any other unlawful activity. The fact that the suspects may reasonably be expected to behave illegally does not prevent law enforcement agents from

150. See supra notes 73-80 and accompanying text.
151. MacDonald, 916 F.2d at 768.
152. See supra notes 50-54 and accompanying text.
153. See supra notes 65-72 and accompanying text.
154. MacDonald, 916 F.2d at 768.
acting lawfully to afford the suspects the opportunity to do so. Thus, assuming arguendo that there were no exigent circumstances before the knock, the agents' conduct did not impermissibly create the circumstances occurring thereafter.\footnote{155}

The court distinguishes Segura\footnote{156} on several grounds. First, the court characterizes the agents' behavior in Segura as "contrived," behavior that was "far different [from] the agents' compliance with the law involved here."\footnote{157} Yet the behavior of the agents here, when they approached a door behind which there were known drug dealers, knocked, and announced that they were police, all the while with guns drawn and battering ram in hand, was at least as contrived as the behavior of the agents in Segura.\footnote{158}

Next, the majority states that the subjective state of mind of the officers involved is irrelevant to an objective analysis of the circumstances.\footnote{159} But unlike in Cattouse, in which the agents' use of marked buy money and an all-white surveillance team were "appropriate investigative techniques,"\footnote{160} the agents' conduct in MacDonald served no legitimate investigatory purpose. By knocking on the door, the officers left only two lawful options open to the occupants: to consent to the entry or to refuse the entry until a warrant could be obtained. The first, albeit unlikely, would have led to a permissible entry.\footnote{161} The second option would have resulted in a warrantless and non-consensual entry, for even if the suspects had not attempted to flee, once alerted to the agents' presence, there would have been a reasonable basis for believing that evidence would be destroyed, even

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\footnote{155}{Id. at 771.}
\footnote{156}{663 F.2d 411 (2d Cir. 1981). See supra notes 81-90 and accompanying text.}
\footnote{157}{MacDonald, 916 F.2d at 772.}
\footnote{158}{See id. at 768; see supra note 127 and accompanying text.}
\footnote{159}{MacDonald, 916 F.2d at 772.}
\footnote{160}{Cattouse, 846 F.2d at 148.}
\footnote{161}{See supra note 115.}

It was not objectively reasonable for the officers to hold any belief that suspects who took such precautions during an apparently innocuous buy would voluntarily consent to a search by law enforcement officers. Since the agents' suggestion that they returned because they thought they could gain entrance to search by consent defies credulity, and since the agents plainly anticipated that the announcement of their identity would precipitate an exigency, for they came armed with a battering ram, . . . the agents must be regarded as having deliberately created the exigency precisely to justify their warrantless entry. We should not endorse such contrivances by law enforcement officials in their efforts to circumvent the Fourth Amendment's warrant requirement.\footnote{MacDonald, 916 F.2d at 776 (Kearse, Circuit Judge, dissenting).}
if that was not the suspects' intent. Therefore, when the officers knocked on the apartment door, entry was inevitable. By permitting an entry under these circumstances, the court creates a new and easy way to circumvent the Fourth Amendment's warrant requirement. Law enforcement agents need only knock on a door and announce themselves before they can effect a valid warrantless entry.

Finally, the court severely limited Segura, holding that "when law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances." Yet the conduct in Segura itself, taking a suspect in custody to an apartment he was known to occupy, is not illegal. In addition, denying application of the exigent circumstances exception only in cases where the police create exigent circumstances through illegal acts begs the question at issue; namely, was the police conduct lawful in entering private property without a warrant? According to the majority, if the knock is lawful, the entry is lawful. Since, however, the warrantless entry is presumptively unlawful, officers should not be permitted such a broad range of conduct from which they could permissibly create exigencies on which to justify a warrantless entry. Applying the court's rationale in MacDonald, police could justify a warrantless search and seizure in any drug-related case on an exigent circumstance exception, provided that the police conduct is not unlawful.

C. Extended Consent

Although Agent Agee could have effected an arrest while in apartment 1-0, the government in MacDonald argued that this consent should be extended to cover Agee's brief absence from the apartment so that, when he returned with reinforcements, he could enter lawfully without a warrant. This argument, endorsed by a majority of the court, is both revolutionary and misplaced. There is no case law to support this "extended consent" theory and, in fact, there is case law that is contra-indicative. This new approach per-

162. See MacDonald, 916 F.2d at 776 (Kearse, Circuit Judge, dissenting).
163. Id. at 772. "Law enforcement agents are required to be innocent but not naive." Id.
165. See supra note 122 and accompanying text.
166. MacDonald, 916 F.2d at 771. "[T]he undercover agent here did not need a warrant to reenter the apartment within ten minutes, having exited only to secure proper protection by obtaining reinforcements." Id.
167. See State v. Douglas, 365 N.W.2d 580, 584 (Wis. 1985) (holding that implied consent to enter to render emergency assistance did not constitute authorization for a second
mits law enforcement agents to effect warrantless entries any time there has been prior consent—for example a previous undercover drug buy. The majority fails to define adequately this new exception, setting neither time limits nor guidelines. In addition, this new exception involves consent, and not the exigent circumstances exception on which the majority bases its decision. But, as Judge Kearse noted, "[c]onsent and exigent circumstances are separate exceptions to the warrant requirement and should not be confused." Perhaps the consent exception is vitiated by the fact that this portion of the decision is dicta, since the majority holds that exigent circumstances validate the entry. However, to make mention of this new extended consent theory, without legal support and without adequate explanation, when the case is premised on a different exception, is beyond the scope of proper judicial authority.

V. CONCLUSION

The MacDonald decision by the Second Circuit surreptitiously weakens the Fourth Amendment warrant requirement, and is a bold step in effecting the Bush Administration's war on drugs. Although concern about drug trafficking in the United States is warranted, these judicial rulings are at odds with the Fourth Amendment constitutional guarantees that are central to American society. As Professor Wisotsky points out, "[t]he result of the War on Drugs is thus a gradual, but inexorable, expansion of enforcement powers at the expense of personal freedoms. The United States is measurably a less free society than it was five or six years ago."
In the context of *MacDonald* alone, the decision does not seem so unfortunate. The defendants in *MacDonald* were culpable—they were selling narcotics and were caught red-handed. However, our system must work to protect all citizens equally. When courts weaken the strength of basic constitutional principles, as the *MacDonald* court did, the effect is on the nation as a whole, and not exclusively on those who are responsible for the drug problem.

Implementation of the new, expanded exigent circumstances exception by law enforcement agents is certain to result in increased violations, both in numbers and scope, of constitutional rights. The police, who become frustrated with the system requiring that they present evidence to a neutral magistrate who makes an objective determination that probable cause does or does not exist to issue a warrant, and are particularly sensitive to the dangers of their work, are likely to act prematurely. Thus, the exception, as applied on the street, will continue to expand.

Even the majority opinion in *MacDonald* acknowledges the fact that this newly-broadened exigent circumstances exception will apply to uphold warrantless entries in almost every drug trafficking situation. “If it is true that ongoing retail narcotics operations often confront law enforcement agents with exigent circumstances, we fail to see how such a sad reality constitutes a ground for declaring that the exigencies do not, in fact, exist.” However, the majority’s reasoning here begins with a conclusion—that exigent circumstances exist in most drug trafficking cases. This is a presumption that should not be made if we still value the wisdom of *Payton* and the Bill of Rights.

In his dissent in *Cattouse*, Judge Oakes wrote two eloquent sentences that apply equally to the *MacDonald* decision: “To my mind the majority’s willingness to expand the exigent circumstances exception is but another sad paragraph in a book that could be entitled *The Erosion of the Fourth Amendment*. And I fear the chapters that have yet to be written.”

*Amy B. Beller*

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173. *MacDonald*, 916 F.2d at 772.
174. *Cattouse*, 846 F.2d at 150.
* The author wishes to express her gratitude to Professor Dwight Greene for his editorial assistance and encouragement.